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No. 73-492

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In the Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR, PETITIONER

v.

FEDERAL REPUBLIC OF GERMANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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This memorandum is submitted in response to the invitation of the Court, dated December 3, 1973, for the Solicitor General to express the views of the United States in this case.

STATEMENT

In January 1969, the Federal Republic of Germany ("Federal Republic") instituted an action in the United States District Court for the Eastern District of New York (No. 69-C-93) to recover two valuable paintings said to have been executed by the medieval German artist Albrecht Duerer, which were in the possession of the respondent Edward I. Elicofon ("Elicofon"). The paintings were alleged to have been stolen from the Weimar Museum some time between May and July 1945, when the City of Weimar was under military

occupation by United States forces. The occupation of the city was subsequently relinquished by the United States to the military forces of the Soviet Union. After World War II the City of Weimar became part of what came to be known as the Eastern Zone of Germany, and is presently located in the territory of the German Democratic Republic ("GDR").

In March 1969, the respondent Grand Duchess of Saxony-Weimar intervened in the suit, claiming ownership of the paintings by assignment from the former Grand Duke of Saxony-Weimar. Thereafter, in April 1969, the petitioner Kunstsammlungen sought leave to intervene in the action, and also instituted an independent suit against Elicofon (No. 69-C-370), seeking a return of the paintings on the ground that it was the successor to the Weimar Museum. Petitioner alleged that it was an independent juristic entity existing under the laws of the GDR, having obtained that status as a result of a decree of the Minister of Culture and Education of the GDR, issued subsequent to the institution of the original action by the Federal Republic.

All respondents opposed petitioner's attempted intervention, maintaining that petitioner was an instrumentality of a non-recognized government, and lacked standing to sue in the American courts. Elicofon also moved to dismiss the independent action against him on the same basis.

In July 1969, the United States Attorney, acting upon the direction of the Attorney General and on behalf of the Department of State, filed in the Federal Republic's action a "Suggestion of Interest" submitting to the court that the Executive Branch of the United States Government (1) does not recognize the East German regime;

(2) that it recognizes the Federal Republic as the only German government entitled to speak for Germany as the representative of German people in international affairs; and (3) that it recognizes the Federal Republic as entitled in this litigation to represent the Weimar Museum as trustee of its interests.

In a memorandum decision of June 25, 1970 (Pet. App. C, pp. 6a-11a), the district court ruled that the government of the GDR, not being recognized, lacked standing to sue. The court ordered an evidentiary hearing to determine whether the petitioner was an arm or instrumentality of the GDR so as to suffer from the same disability.

After the hearing, the district court ruled (Pet. App. C, pp. 11a-17a) that the petitioner was an "arm and agency of the GDR" and lacked standing to sue. The court denied the petitioner intervention in the action instituted by the Federal Republic, and dismissed the independent action which the petitioner had brought against Elicofon.

The Court of Appeals for the Second Circuit affirmed the district court's two rulings (Pet. App. B, pp. 2a-5a). Petitioner filed a petition for a writ of certiorari, which the Federal Republic and Elicofon opposed. They contended that the courts below correctly concluded that petitioner lacked standing to sue because petitioner was an agency of a non-recognized government.[1]

In a supplemental brief filed on October 13, 1973, petitioner suggested that there had been significant

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[1] In a letter to the Court, dated October 15, 1973, respondent Grand Duchess of Saxony-Weimar joined in the opposition filed by the Federal Republic.

international developments since the filing of the original petition which merited this Court's consideration. Petitioner pointed to the recent admission of both Germanys to membership in the United Nations and urged that the United States' willingness to treat the GDR as a sovereign in the United Nations be deemed to constitute an "implied recognition" of that government by the United States. In view of these developments, petitioner suggested that the Court grant the petition and either reverse the decision below on the ground that the "implied recognition" of the GDR has now removed petitioner's incapacity to sue, or vacate the judgment of the court of appeals and remand for reconsideration in light of the changed circumstances.

Respondent Federal Republic then filed with this Court a supplemental brief changing the conclusion in its original brief in opposition, and stating that it "has no objection to this case being remanded" to the court of appeals "for reconsideration or for a stay of all proceedings due to changed circumstances."

DISCUSSION

The "Suggestion of Interest" which the Executive Branch filed in the district court in July 1969 was prompted by a request from the Federal Republic. Since that time, the relationship between the Federal Republic and the GDR has undergone significant changes. The Department of State understands that if the Federal Republic were to prevail in its replevin action against the respondent Elicofon, the paintings which form the subject of the action would shortly be turned over by the Federal Republic to the GDR.

In view of these developments, the Executive Branch would not object if petitioner were granted leave to

intervene in the district court in the action instituted by the Federal Republic.[2]

CONCLUSION

For the foregoing reasons, the United States has no objection to the granting of the petition for a writ of certiorari and the vacation of the judgment of the court of appeals so that the case may be remanded to the district court with a direction that the petitioner be permitted to intervene in the action instituted by the Federal Republic (No. 69-C-93).

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

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[1] We believe, however, that the courts below correctly decided the case on the record as it then stood.